SEP 29

Supreme Court of the United States

October Term, 1941

No. 20

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEFNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE PETITIONER ON THE MERITS

CASSIUS M. CLAY,
MORISON R. WAITE,
HARRY H. BYRER,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio,
Attorneys for Petitioner.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

TABLE OF CASES

	PAGE
Arkansas Corporation Commission v. Thompson, 313 U. S. 132, 61 S. C. R. 888	1
Canada Malting Co. v. Paterson Co., 285 U. S. 413, 422	2
Commonwealth of Massachusetts v. State of Missouri, 308 U. S. 1	2
Egbert v. Short [1907], 2 Ch. 205	2
La Societe Du Gaz De Paris, Pursuers—La Societe Anonyme De Navigation—"Les Armateurs Francais," Defenders, [1926] Session Cases (H. L.) 113	2
Logan v. Bank of Scotland [1906], 1 K. B. 141	2
Norton v. Norton [1908], 1 Ch. 471	2
Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189	2
Pennsylvania v. Williams, et al., Receivers, 294 U. S. 176	2
People of State of California v. Thompson, 313 U. S. 109, 61 S. C. R. 930	1
Rogers v. Guaranty Trust Co., 288 U. S. 123, 130, 131	2
Secretary of State for Home Affairs v. O'Brien [1923], 1 Appeal Cases (H. L.) 603	3
Skiriotes v. State of Florida, 313 U. S. 69, 61 S. C. R. 924	1
Watson v. Buck, U. S. , 61 S. C. R. 962	1

Supreme Court of the United States

October Term, 1941

No. 20

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

FREDERICK S. KEPNER,
Respondent.

SUPPLEMENT TO BRIEF FOR THE PETITIONER ON THE MERITS

I

In addition to recent cases of this Court cited at pages 16 and 17 of Petitioner's Brief on the Merits, in which the federal power granted under acts of Congress were held not to exclude powers of a state not prohibited, we cite later cases of the Court to the same effect:

Arkansas Corporation Commission v. *Thompson*, 313 U. S. 132, 61 S. C. R. 888;
Skiriotes v. *State of Florida*, 313 U. S. 69, 61 S. C. R. 924;
People of State of California v. *Thompson*, 313 U. S. 109, 61 S. C. R. 930;
Watson v. *Buck*, U. S. , 61 S. C. R. 962.

II

During the oral argument of this case last April, reference was made by the Court to the power of courts, includ-

ing the federal courts, to decline jurisdiction in a proper case, when there is no want of another suitable forum. As there may be discussion again with respect to that point, there are cited here cases in support of that proposition.

Canada Malting Co. v. *Paterson Co.*, 285 U. S. 413, 422;
Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 131;
Commonwealth of Massachusetts v. *State of Missouri*, 308 U. S. 1;
Pennsylvania v. *Williams, et al., Receivers*, 294 U. S. 176;
Penn General Casualty Co. v. *Pennsylvania*, 294 U. S. 189.

The doctrine i one frequently applied in England, and is sometimes ref :red to as the doctrine of *forum non conveniens.*

Logan v. *Bank of Scotland* [1906], 1 K. B. 141;
Egbert v. *Short* [1907], 2 Ch. 205;
Norton v. *Norton* [1908], 1 Ch. 471;
La Societe Du Gaz De Paris, Pursuers—La Societe Anonyme De Navigation—"Les Armateurs Francais," Defenders, [1926] Session Cases (H. L.) 113.

In the last case Lord Shaw of Dunfermline at page 20 said:

> "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a *forum* which is not the natural or proper *forum*, either on the ground of convenience of trial or the residence or domicile of parties, or of its being the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied."

Another case of great importance is one in which the House of Lords declined jurisdiction notwithstanding the Appellate Jurisdiction Act of 1876, providing that an ap-

peal lies to the House of Lords from any order of the Court of Appeal in England.

Secretary of State for Home Affairs v. *O'Brien* [1923], 1 Appeal Cases (H. L.) 603.

It is thus apparent that the mere conferring of jurisdiction by statute gives no absolute right to proceed in a court having jurisdiction so conferred, when there are good reasons for the trial of the case in another and more appropriate forum. The Respondent, doubtless to toll the statute of limitations, has brought an action in the Common Pleas Court of Hamilton County, Ohio, filed May 14, 1941, on the same cause of action as that pending in the Eastern District of New York, which Ohio case is now at issue and ready for trial. There is thus no want of another suitable forum, one selected by the Respondent from several available and suitable for the trial of the controversy.

The Federal Employers' Liability Act not having created an absolute right in the Plaintiff to resort to a wholly inappropriate court, it cannot be said that Congress by its enactment, deprived the courts of the State of Ohio of the power to enjoin the Ohio citizen and resident from so proceeding, "for the purpose of annoying, harassing and vexing the plaintiff herein" (The Baltimore and Ohio Railroad Company), which quotation is an allegation of the petition below admitted by the demurrer.

Respectfully submitted,

CASSIUS M. CLAY,
MORISON R. WAITE,
HARRY H. BYBEE,
WILLIAM A. EGGERS,
PHILIP J. SCHNEIDER,
Counsel for Petitioner.

September 22, 1941.

WAITE, SCHINDEL & BAYLESS,
Cincinnati, Ohio,
Attorneys for Petitioner.